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Hill v. Colorado: The Supreme Court's Deviation from Traditional First Amendment Jurisprudence to Silence the Message of Abortion Protesters

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NOTE

HILL V. COLORADO: THE SUPREME COURT'S DEVIATION FROM TRADITIONAL FIRST AMENDMENT JURISPRUDENCE TO SILENCE THE MESSAGE OF ABORTION PROTESTORS

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The First Amendment[1] to the Constitution of the United States provides protection for freedom of religion, assembly, press, and speech.[2] Since the ratification of the First Amendment, the United States Supreme Court has found that the rights contained in the First Amendment are fundamental and deserve a higher level of scrutiny when the government attempts to infringe on these rights.[3] Freedom of speech is a fundamental liberty;[4] however, the Supreme Court has held repeatedly that the right to free speech is not absolute.[5] The Court has

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1. U.S. CONST. amend. I.

2. *Id.* The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

3. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). In his footnote Justice Stone stated that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* The footnote suggested three situations in which the Court should apply strict scrutiny: (1) if "legislation appears on its face to be within a specific prohibition of the Constitution, such as those in the first ten amendments"; (2) if legislation restricts those political processes "which can ordinarily be expected to bring about repeal of undesirable legislation," such as impairments of the right to vote; and (3) if legislation is aimed at "discrete and insular minorities" who are unable to protect themselves through the ordinary political processes because of the prejudice against them. *Id.*

4. *See* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937). Justice Cardozo suggested that "our history, political and legal," recognized "freedom of thought, and speech" as "the indispensable condition, of nearly every other form of freedom." *Id.* Therefore, he characterized freedom of speech as a fundamental liberty. *Id.*

5. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a

found that when the First Amendment's free speech protection is asserted against the exercise of valid governmental powers, it must weigh the respective interests.[6]

Perhaps one of the most emotionally-charged contemporary free speech issues arises when the Court balances the government's interest in protecting the safety of patients and staff at abortion clinics against the First Amendment right to free speech of abortion protestors.[7] Although women have been able to legally get an abortion for twenty-eight years,[8] it has become increasingly difficult for them to obtain one.[9] Harassment, blockades, vandalism, arson, and murder have become significant barriers for women seeking abortions.[10] While women must be given legal protection so they can exercise their right to obtain an abortion, it should be done without trampling on the First Amendment rights of

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theatre and causing a panic"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). In *Chaplinsky*, the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id.; *see also* Dennis v. United States, 341 U.S. 494, 524-25 (1951) (finding that "[t]he demands of free speech in a democratic society as well as [countervailing governmental interests] are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved"); Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) (holding that "we reject the view that freedom of speech and association . . . are 'absolutes'"); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 283 (1964) (holding that a statement about a public official is protected by the First Amendment except when the statement is made with actual malice); Miller v. California, 413 U.S. 15, 23 (1973) (finding that obscene material falls outside of the First Amendment).

6. *Konigsberg*, 366 U.S. at 51 (finding that when "constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved"); *see also Dennis*, 341 U.S. at 510 (defending the balancing test).

7. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); *see also* Schenck v. Pro-Choice Network, 519 U.S. 357 (1997). In these two cases, the Court examined various injunctions that restricted abortion protestors' rights to picket and speak outside of abortion clinics. *Madsen*, 512 U.S. at 757; *Schenck*, 519 U.S. at 362.

8. Roe v. Wade, 410 U.S. 113, 154 (1973); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 869 874-75 (1992) (reaffirming the constitutional protection for abortion, but instituting a new "undue burden" test for evaluating abortion restrictions).

9. Freedom of Access to Clinic Entrances Act of 1993, H.R. REP. NO. 103-306, at 6 (describing the nationwide campaign to bar access to facilities that provide abortions).

10. *See generally* Stephen J. Hedges et al., *Abortion: Who's Behind the Violence?*, U.S. NEWS & WORLD REP., Nov. 14, 1994, at 50 (discussing various acts of violence committed against abortion clinics and doctors); Fay Clayton & Sara N. Love, *NOW v. Scheidler: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 968-73 (1999) (examining the climate of terrorism in the early 1980s).

abortion protestors.[11]

The Supreme Court has dealt directly with restrictions on these protestors, called sidewalk counselors, outside of abortion clinics on three separate occasions.[12] The first two cases dealt with court injunctions,[13] while the third and most recent case dealt with a statewide statute.[14] Although these cases have factual differences, the Supreme Court has consistently denied abortion protestors their full First Amendment protections.[15]

At issue in *Hill v. Colorado*[16] was the constitutionality of a 1993 Colorado statute regulating speech-related conduct within one hundred feet of the entrance to any health care facility.[17] The challenged section of the statute makes it unlawful for any person within one hundred feet of a health care facility's entrance to "knowingly approach within eight feet of another person, without that person's consent," in order to pass "a leaflet or handbill to, display a sign to, or engage in oral protest, education or counseling with [that] person . . ."[18] The crime of knowing

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11. *See generally* Deborah A. Ellis & Yolanda S. Wu, *Abortion Rights: Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-abortion Protestors' First Amendment Rights in Schenck v. Pro-Choice Network*, 62 BROOK. L. REV. 547, 547-49 (1996) (discussing courts' approaches to protecting the safety of patients and providers at reproductive health care facilities without infringing on abortion protestors' free speech rights); Lolita Youmans, Note, *Operation Rescue v. Planned Parenthood, Inc.: A Judicial Showdown Over Sidewalk Counselors and First Amendment Rights*, 37 HOUS. L. REV. 603, 605-06 (2000) (examining whether the First Amendment guarantee of free speech allows abortion protestors to approach women seeking abortion services).

12. *See* Hill v. Colorado 530 U.S. 703, 712-14 (2000) (upholding a state law banning protestors' activities outside of medical facilities); *Madsen* 512 U.S. at 764-65 (finding that the applicable test under the First Amendment for content-neutral, generally applicable statutes was not sufficient to protect First Amendment rights curtailed by an injunction issued by a court); *Schenck*, 519 U.S. at 377-81 (affirming in part and striking in part an injunction that created both floating bubble zones and fixed bubble zones).

13. Both the *Madsen* and *Schenck* decisions examined the constitutionality of court issued injunctions. As discussed below, injunctions receive a different level of scrutiny than statutes. *See infra* notes 95-98 and accompanying text.

14. *See Hill*, 530 U.S. at 707-08; *see also infra* notes 18-22 and accompanying text.

15. *See generally* Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson From the Abolitionists*, 62 ALB. L. REV. 853, 936 (1999) (suggesting that abortion protestors are experiencing the same type of censorship that slavery abolitionists experienced before the Civil War).

16. 530 U.S. 703 (2000).

17. *Id.* at 707. The statute at issue was Colo. Rev. Stat. § 18-9-122 (1999).

18. *Hill*, 530 U.S. at 707 (citation omitted). Section 18-9-122 reads as follows:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's

obstruction is a class three misdemeanor, punishable by a minimum fine of fifty dollars and a maximum fine of seven hundred and fifty dollars, up to six months imprisonment, or a combination of both.[19]

The Supreme Court found the statute consistent with the First Amendment.[20] The Court concluded that the statute was a content-neutral, valid time, place, and manner restriction on speech.[21] Furthermore, the Court held that the statute was neither unconstitutionally vague, overbroad, nor a prior restraint on speech.[22]

This Note examines the interplay between a woman's right to enter a healthcare facility to obtain an abortion and a speaker's right to "protest, educate, or counsel" outside these facilities. This Note first discusses the evolution of the First Amendment right to free speech. This Note then analyzes the reasoning behind several Supreme Court decisions that either uphold or strike down statutes and injunctions that deal with free speech. Next, this Note focuses on the Court's handling of free speech as it pertains to the issue of abortion. This Note then analyzes the majority

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right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

Colo. Rev. Stat. § 18-9-122 (1999).

19. Colo. Rev. Stat. § 18-1-106 (1999).

20. *Hill*, 530 U.S. at 714-15.

21. *Id. See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (describing content neutrality).

22. *Hill*, 530 U.S. at 730-35.

and dissenting opinions of *Hill v. Colorado*, and explains why the majority's conclusion is flawed. Finally, this Note discusses why the dissent's rationale is more credible and more likely to preserve the sanctity of an individual's right to free speech.

I. THE FIRST AMENDMENT'S RIGHT TO FREE SPEECH

A. The Importance of Free Speech

Free speech preserves three principal values: (1) advancing knowledge and "truth" in the "marketplace of ideas," (2) facilitating representative democracy and self-government, and (3) promoting individual autonomy, self-expression, and self-fulfillment.[23] The first value, advancing knowledge in the marketplace of ideas, is based on the belief that suppression of any opinion is wrong, whether or not the opinion is true.[24] If a correct opinion is suppressed, society is denied the truth.[25] If a false opinion is suppressed, society is unable to appreciate the full understanding of the truth because it is denied the ability to see why an opinion is wrong.[26] Free speech invites dispute,[27] and any governmental

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23. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW, 1025 (13th ed. 1997).

24. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.02 (1994).

25. *Id.* § 2.02[1] (discussing John Stuart Mill's assertions in his book ON LIBERTY); *see also* GUNTHER & SULLIVAN *supra* note 23, at 1025.

26. GUNTHER & SULLIVAN *supra* note 23, at 1025. (discussing John Stuart Mill's libertarian argument). Mill asserted that:

> [T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course, deny its truth; buth they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume certainty is the same thing as *absolute* certainty . . . . There is the greatest difference between presuming an opinion to be true, because with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.

SMOLLA, *supra* note 24, § 2.02[1] (quoting JOHN STUART MILL, ON LIBERTY, Ch. II); *see also Cato's Letters (1720)*, *in* FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY 12, 14 (Sheila Suess Kennedy ed., 1999) (noting that statements, "[w]hen they are honest, they ought to be publick known, that they may be publickly commended; but if they be knavish or pernicious, they ought to be publickly exposed, in order to be publickly detested").

27. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1948). The majority stated: "[A] function of free speech under our system of government is to invite dispute. It may indeed

action limiting this exchange of ideas chills free expression. Several court decisions discuss the importance of the marketplace of ideas,[28] and demonstrate the value of developing a better understanding of the truth.

The Supreme Court emphasized the second principal value, facilitating representative democracy and self-government, in several decisions.[29] In *New York Times Co. v. Sullivan*,[30] for example, Justice Brennan explained that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[31] Free expression of ideas is an intrinsic part of our political system.[32] Broad debate enables the public to inform and improve the making of governmental policies.[33] Those who do not agree with current public

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best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging." *Id.*

28. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (finding that "the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution").

29. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (discussing the importance of debate on public issues); Cohen v. California, 403 U.S. 15, 24-25 (1971).

30. 376 U.S. 254 (1964).

31. *Id.* at 270; *cf.* Mills v. Alabama, 384 U.S. 214, 218 (1966) (stating that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").

32. *See generally* FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY 12 (Sheila Suess Kennedy ed., 1999). Between 1720 and 1723, John Trenchard and Thomas Gordon wrote numerous essays on the nature of freedom. *Id.* at 12. Issued as *Cato's Letters*, these essays influenced the debate over England's relationship with the colonies. *Id.* One of these essays, "Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty" addressed the principles that should guide government:

> Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech: Which is the Right of every Man, as far as by it he does not hurt and control the Right of another, and this is the only Check which it ought to suffer, the only Bounds which it ought to know.
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> This sacred Privilege is so essential to free Government, that the Security of Property, and the Freedom of Speech, always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own. Whoever would overthrow the Liberty of the Nation, must begin by subduing the Freedom of Speech; a Thing terrible to publick Traytors.

Cato's Letters, *supra* note 26.

33. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 53-54, 93-94, 105-07 (1980).

policy can voice their concerns and disagreements, and thereby encourage political stability.[34] Political expression must be encouraged and protected to ensure a fair representation of ideas and values.[35] Without this safety valve, individuals would have to find other means, perhaps through violence, to express their opinions.[36]

B. The Balancing Approach to Protected Speech

Although speech is entitled to the protections of the First Amendment, the freedom of speech is not absolute.[37] The Court has found that certain categories of speech are not protected.[38] For example, in *Chaplinsky v. New Hampshire*, the Court found that "fighting words" that inflict injury or incite a breach of the peace are not protected by the First Amendment.[39]

When determining whether a certain type of speech can be proscribed, the Court balances the First Amendment values inherent in the communication with the state interest allegedly justifying the proscription.[40] The Court's decision in *Cohen v. California*[41] is perhaps one of the first manifestations of the Court's balancing approach to free

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34. *See* Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957). Chief Justice Earl Warren noted that "[h]istory has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been the vanguard of democratic thought and whose programs were ultimately accepted .... The absence of such voices would be a symptom of grave illness in our society." *Id.*

35. *See generally id.* (discussing how free speech prevents government from entrenching itself indefinitely by keeping clear the channels of political change).

36. In *Whitney v. California*, 274 U.S. 357 (1927), Justice Brandeis cautioned in his concurrence that "[t]hose who won our independence believed that . . . fear breeds repression; that repression breeds hate; that hate menaces stable government [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." *Id.* at 375.

37. *See supra* note 5 and accompanying text.

38. Chaplinksy v. New Hampshire, 315 U.S. 568, 571-72 (1942); *see also* Miller v. California, 413 U.S. 15, 24 (1973) (finding that obscenity is not protected by the First Amendment). In *Chaplinsky*, Justice Murphy established that there are certain words - "fighting words" - that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 571-72. He suggested that such words play no essential part in the exposition of ideas and have slight social value as a step to the truth. *Id.*; *see also* Cohen v. California, 403 U.S. 15, 20-21 (1971) (suggesting that words that may lead to violence can be regulated). In *Cohen*, the Court explained that profanity was at least sometimes protected speech. *Id.* at 19. The Court recognized that lewd and profane words may have an emotive function, and may not be proscribed in all cases. *Id.* at 26.

39. *Chaplinsky*, 315 U.S. at 571-72.

40. *Cohen*, 403 U.S. at 24-25.

41. 403 U.S. 15 (1971).

speech.[42] In *Cohen*, the defendant was arrested and convicted under a California statute for wearing a jacket bearing the words "Fuck the Draft" in the corridor outside the Los Angeles County Courthouse.[43] The Supreme Court reversed the conviction, finding that the First Amendment "must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic."[44] The Court discussed "how the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[45]

C. The "Captive Audience"

In *Cohen*, the Court discussed the degree to which the defendant's expression intruded into the privacy of an unwilling listener.[46] Specifically, the Court found that to justify the chilling of speech solely to protect others the government must show that substantial privacy interests are being invaded in an intolerable manner.[47] Any broader view of this authority would allow a majority to silence dissidents simply due to a difference of opinion.[48] The government may "properly act" to ensure the privacy of the home and to prohibit the intrusion into the home of "unwelcome views and ideas."[49] However, the mere presence of unwilling listeners or viewers in a public setting does not automatically justify governmental actions curtailing all potentially offensive speech.[50]

The Court has compared the right to communicate with the basic right

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42. *See generally* Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1006-1008 (1972) (discussing the balancing approach in *Cohen*).

43. *Cohen*, 403 U.S. at 16.

44. *Id.* at 23.

45. *Id.* at 19.

46. *Id.* at 21.

47. *Id.*

48. *Id.* This is the type of suppression that John Stuart Mill argued was detrimental to society. *See supra* notes 24-26 and accompanying text.

49. *Cohen*, 403 U.S. at 21-22; *see also* Rowan v. United States Post Office Dep't, 397 U.S. 728, 729-30 (1970) (upholding, against a First Amendment challenge a federal law permitting recipients of a "pandering advertisement," which offered for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," to request a post office order requiring the mailer remove the recipient's name from the mailing list and cease all future mailings).

50. *Cohen*, 403 U.S. at 22. Justice Harlan reasoned that in the public square, government may not shield listeners from offensive speech. *Id.* at 21. Rather, individuals must simply avert their eyes and ears. *Id.*

to be free from unwanted sights, sounds, and tangible matter.[51] Although in many circumstances we are part of captive audiences, when inside the home our individual autonomy allows us to control any unwanted speech, signs, or other matter.[52] In *Rowan v. United States Post Office Department*, Chief Justice Burger reasoned "[t]hat [just because] we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."[53] Therefore, speech or conduct that intrudes into the privacy of the home is not given the full protections of the First Amendment.[54]

D. Content-Based vs. Content-Neutral Restrictions

The distinction between content-based and content-neutral regulations is a crucial one in First Amendment law. Traditionally, content-based distinctions have been scrutinized more carefully than content-neutral distinctions.[55] This is because the First Amendment guarantees freedom to advocate the content of one's ideas.[56] Therefore, it makes sense that a law that restricts the content of one's ideas is subjected to a higher level of scrutiny.[57]

Viewpoint restrictions are those that prohibit speech or conduct based on a particular perspective. For instance, in *R.A.V. v. St.Paul*,[58] the Court

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51. *Rowan*, 397 U.S. at 736 (explaining that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"); *see also* FCC v. Pacifica Found., 438 U.S. 726 (1978). In *Pacifica*, the issue was a twelve-minute monologue, broadcast during a mid-afternoon weekday, by George Carlin in which he discussed the "original" seven dirty words: "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* at 751. The Court concluded that the FCC could regulate materials presented over the airwaves since the materials confront citizens, "not only in public but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748.

52. *Rowan*, 397 U.S. at 736.

53. *Id.* at 738. *See generally* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (stating that "[t]he First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid the objectionable speech"). However, in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980), the Court found that consumers in the home may escape exposure to objectionable material that has been mailed to them simply by transferring the material from the envelope to the garbage. *Id.* at 542.

54. *Pacifica*, 438 U.S. at 748; *Rowan*, 397 U.S. at 736.

55. *See infra* notes 55-65 and accompanying text.

56. Brandenberg v. Ohio, 395 U.S. 444, 448-49 (1969); *see also supra* notes 23-28 and accompanying text.

57. *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992); Police Dep't v. Mosley, 408 U.S. 92 (1972).

58. 505 U.S. 377 (1992).

invalidated an ordinance prohibiting symbols that tend to arouse racial anger or alarm.[59] The majority found that the ordinance was invalid because it prohibited fighting words by bigots but not those against them.[60] Therefore, the Court used strict scrutiny and struck down the ordinance.[61]

The Court also strictly scrutinizes regulations that impose restrictions on subject matter.[62] The ordinance in *R.A.V.* was also directed at the subject matter of certain speech.[63] Specifically, the ordinance forbade only words that were "addressed to one of the specified disfavored topics" of race, color, creed, religion, or gender.[64] These types of regulations are highly suspect and will only be upheld if they pass the Court's strict scrutiny.[65]

However, content-neutral laws that aim at a type of expression, but for reasons unrelated to its content, require a different level of scrutiny. A form of intermediate scrutiny is used as the standard of review for content-neutral regulations: government can justify content-neutral regulations of speech only if it can show that they are closely tailored to serve a "substantial" or "significant" governmental interest.[66]

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59. *Id.* at 391. The St. Paul Bias-Motivated Crime Ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380.

60. *Id.* at 391-92. Justice Scalia stated that: "St. Paul has no [authority] to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

61. *Id.* at 395-96.

62. *Id.*

63. *Id.* at 391.

64. *Id.*

65. Police Dep't v. Mosley, 408 U.S. 92, 100-01 (1972) (invalidating a Chicago disorderly conduct ordinance that barred picketing within one hundred and fifty feet of a school while the school was in session, but exempted peaceful picketing of any school involved in a labor dispute); *see also* Carey v. Brown, 447 U.S. 455, 457, 460-61 (1980) (finding unconstitutional a state law that generally barred picketing outside residences or dwellings, but exempted "the peaceful picketing of a place of employment involved in a labor dispute").

In *Mosley*, the Court stated that:

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . There is an "equality of status in the field of ideas" and government must afford all points of view an equal opportunity to be heard.

Mosley, 408 U.S. at 95-96.

66. United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also* Ward v. Rock Against

E. Time, Place and Manner Restrictions

It has been established that one may not exercise his or her right to free speech at any public place and at any time.[67] The government has an interest in maintaining order and control over public streets, parks, and other fora.[68] Therefore, deference is given to statutes or ordinances that are content-neutral and serve the significant governmental interest of maintaining order by imposing time, place, or manner restrictions.[69] For example, in *Heffron v. International Society for Krishna Consciousness Inc.*,[70] the Court validated a Minnesota state fair rule prohibiting the sale or distribution of any merchandise, including printed or written material, except from booths rented to all applicants in a nondiscriminatory manner on a first-come, first-serve basis.[71]

In *Ward v. Rock Against Racism*,[72] the Court clarified the time, place, or manner test.[73] The Court rejected a First Amendment challenge to New York City's regulation mandating the use of city-provided sound systems and technicians to control the volume of concerts in Central Park.[74] The Court's main concern was how strictly to interpret the "narrowly tailored means" requirement.[75] Writing for the Court, Justice Kennedy announced that a regulation passed the time, place, or manner regulation was proper if it was "narrowly tailored to serve a significant governmental interest."[76] Justice Kennedy clarified that "[l]est any

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Racism, 491 U.S. 781, 782, 796-98 (1989) (noting that while a content-neutral law must be closely tailored to its ends, the government need *not* employ the least restrictive alternative).

67. Cox v. Louisiana, 379 U.S. 536, 554 (1965). The Court found that "a restriction . . . designed to promote the public convenience . . . and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection." *Id.* at 554.

68. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981).

69. *Id.* at 643-44; *see also infra* note 71 and accompanying text.

70. 452 U.S. 640 (1981).

71. *Id.* at 643-44. The International Society for Krishna Consciousness challenged the rule because it suppressed a religious ritual that enjoined its members to go into public places to distribute religious literature. *Id.*

72. 491 U.S. 781 (1989).

73. *Id.* at 798-99.

74. *See id.* at 802-03. The Court agreed that the regulation was content-neutral and because it involved a public forum, New York City's interest in limiting excessive noise was substantial, and the regulation was proper. *Id.*

75. *Id.* at 798-99. In *Ward*, the Court of Appeals invalidated the regulation because the city had not shown that it lacked other, less restrictive means of regulating concert volume. *Id.* at 798.

76. *Id.* at 796.

confusion on the point remain, we affirm today that a regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[77] Applying this deferential standard to the regulation, Justice Kennedy concluded that the New York City regulation was a "reasonable regulation of the place and manner of expression" that left ample alternatives for communication and therefore was proper.[78]

F. The Intersection of Abortion and the First Amendment

Since the legalization of abortion,[79] the Court has struggled with balancing a woman's right to obtain an abortion and protestors' First Amendment rights to free speech.[80] The Court has examined protestors' rights outside of clinics[81] as well as their rights in other public fora.[82] In *Frisby v. Schultz*,[83] abortion protestors picketing in front of a doctor's residence sued town officials because of a city ordinance that banned all residential picketing.[84] The Court reasoned that public streets are a traditional public forum that are normally protected by the First Amendment; however, since the ordinance was content-neutral, the Court did not apply strict scrutiny.[85] Instead, the Court examined the

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77. *Id.* at 798. Refuting the Court of Appeals rationale, Justice Kennedy stated that "our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Id.* at 797 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

78. *Id.* at 803.

79. Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, the Court created the trimester framework where during the first trimester the state has no compelling interest to interfere with a woman's decision to have an abortion, during the second trimester the state has a compelling medical interest in the life of the mother, and during the third trimester the state has a compelling interest in protecting the fetus. *Id.* at 163-64. During the third trimester, the state may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of life or health of the mother." *Id.* at 165.

80. Madsen v. Women's Health Ctr., Inc. 512 U.S. 753, 757 (1994); Schenck v. Pro-Choice Network, 519 U.S. 357, 361 (1997).

81. *Madsen*, 512 U.S. at 757.

82. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 476 (1988) (concerning protestors on a public street outside of the home of a doctor who performed abortions).

83. 487 U.S. 474 (1988).

84. *Id.* at 476-77. A group ranging from eleven to over forty people, all opposed to abortions, picketed the residence of a doctor who performed abortions. *Id.* at 476.

85. *Id.* at 481-86. The Court stated that public streets are "the archetype of traditional public forum." *Id.* at 480. Also, the Court noted that "a public street does not lose its status as a traditional public forum simply because it runs through a residential

ordinance to see whether it was narrowly tailored to meet a significant government interest and left ample alternative means of communication.[86]

The Court validated the ordinance in *Frisby* and stressed that the government had a significant interest in protecting residential privacy from targeted picketing.[87] In addition, because the protestors' aimed their offensive speech at a captive audience, those inside their homes, the First Amendment did not protect their speech.[88] Citing *Pacifica*, Justice O'Connor stated for the majority that "[t]here simply is no right to force speech into the home of an unwilling listener."[89]

1. Restrictions on Sidewalk Counselors Outside Abortion Clinics

In 1994, the Supreme Court addressed First Amendment concerns in the abortion context in *Madsen v. Women's Health Center, Inc.*[90] The Court upheld in part and struck down in part a Florida state court injunction that limited the activities of abortion protestors on public streets outside an abortion clinic.[91] Specifically, the injunction proscribed protestors from "obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic;"[92] from "congregating, picketing, patrolling, [or] demonstrating . . . within [thirty-six] feet of the property line;"[93] from making audible sounds or from displaying "images observable to or within earshot of the patients inside the Clinic" during certain hours;[94] from physically approaching any person within three hundred feet of the clinic "seeking the services of the Clinic unless such person indicates a desire to communicate;"[95] from demonstrating within three hundred feet of, or blocking access to the residence of any staff member of the Clinic "temporarily or otherwise;"[96] from coming into physical contact with employees, health care

neighborhood." *Id.*

86. *Id.* at 482; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 796-98 (1989).

87. *Frisby*, 487 U.S. at 484. The Court noted the unique nature of the home and recognized that "preserving the sanctity of the home . . . is surely an important value." *Id.* (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

88. *Id.*; *see also supra* notes 45-53 and accompanying text (discussing the captive audience doctrine and its relation to the sanctity of the home).

89. *Frisby*, 487 U.S. at 485.

90. 512 U.S. 753, 757 (1994).

91. *Id.*

92. *Id.* at 759.

93. *Id.*

94. *Id.* at 760.

95. *Id.*

96. *Id.*

professionals, staff members, or patients of the Clinic;[97] and from "encouraging . . . other persons to commit any of the prohibited acts listed herein."[98]

Chief Justice Rehnquist, writing for the majority,[99] ruled that the injunction was not content or viewpoint based simply because it restricted the speech of abortion protestors.[100] He reasoned that "an injunction, by its very nature, applies only to a particular group," and may regulate that group's speech.[101] Therefore, the Court found that the injunction was not invidiously content or viewpoint motivated; rather, it was issued as a way to stop the protestor's repeated violations of the lower court's original order.[102]

The Court announced a new test for evaluating the constitutionality of content-neutral injunctions.[103] The Court found that injunctions must "burden no more speech than necessary to serve a significant government interest."[104] The Court rationalized that injunctions deserve a more rigorous test than the time, place, or manner test used for statutes because statutes are enacted by the legislature to advance social interests, while injunctions are directed at those individuals who violate a

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97. *Id.*

98. *Id.* at 761 (quoting Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 679-80 (Fla. 1993)).

99. *Id.* at 757. Justices Blackmun, O'Connor, Souter, and Ginsberg joined in the Chief Justice's opinion. *Id.* Justice Stevens joined in parts of the opinion and filed a separate concurring opinion which concurred in part and dissented in part. *Id.* at 777. Justice Stevens argued that the Court should have applied a more lenient standard to the injunction. *Id.* at 778. Justice Souter filed a separate concurring opinion. *Id.* at 776. Justice Scalia, joined by Justices Kennedy and Thomas, filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 784. Justice Scalia argued that speech restrictive injunctions should be subjected to the same level of strict scrutiny that is given to content-based statutes. *Id.* at 792. Justice Scalia would have found all of the provisions of the injunction unconstitutional. *Id.* at 785.

100. *Id.* at 762-63.

101. *Id.* at 762.

102. *Id.* at 763. The Court stated:

> [I]n determining content neutrality . . . [w]e thus look to government's purpose as the threshold consideration. Here the state court imposed restrictions on petitioners incidental to their abortion message because they repeatedly violated the court's original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic.

Id.

103. *Id.* at 765.

104. *Id.*

legislative or judicial decree.[105] Therefore, the Court reasoned that injunctions "carry greater risks of censorship and discriminatory application . . ."[106]

In making its decision, the Court determined that the injunction addressed several state interests including: protecting women's freedom to obtain medical services; "ensuring the public safety and order;" maintaining the "free flow of traffic on public streets and sidewalks;" protecting property rights; and promoting the medical privacy of patients in a clinic.[107] Using the new test, the Court determined whether each aspect of the Florida injunction burdened more speech than necessary in accomplishing these interests.[108]

The Court upheld the use of the thirty-six foot buffer zone in areas of clinic property used for access to and from the facility for automobile traffic, but struck down the zone around all other parts of the clinic property.[109] In making this decision, the Court relied on videotape showing abortion protestors blocking automobile traffic near the clinic driveway.[110] The Court also upheld the prohibition on protesting audibly to patients inside the clinic during specified hours to ensure the health and well-being of clinic patients.[111] However, the Court struck down the provision proscribing protests involving "images observable" by patients in the clinic.[112] The Court also struck down the three hundred foot "no approach" zone.[113] The Court found that all uninvited approaches, even those with a peaceful intent, could not be justified.[114] Finally, the Court struck down the bar against protesting at the home of employees of the clinic because the three hundred foot buffer zone was much larger than necessary.[115]

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105. *Id.* at 764.

106. *Id.*

107. *Id.* at 767-68.

108. *Id.* at 768.

109. *Id.* at 770-71.

110. *Id.* at 770. The Court concluded: "On balance, we hold that the [thirty-six] foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake." *Id.*

111. *Id.* at 772.

112. *Id.* at 773.

113. *Id.* at 774-76.

114. *Id.* at 774. The Court noted that "citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.*

115. *Id.* at 775. The Court noted that privacy of the home may be protected, but the size of the buffer zone was much larger than a similar zone which had previously been found constitutional. Frisby v. Shultz, 487 U.S. 474, 477 (1988) (upholding a town

Justice Scalia's dissent criticized the creation of a new test for protests in a traditional public forum.[116] He pointed out that injunctions are the product of a single judge, thereby limiting the defenses available to persons cited for contempt.[117] Therefore, Justice Scalia reasoned that such injunctions should be subjected to strict scrutiny and found the injunction in *Madsen* both content and viewpoint based, and perhaps an exercise of prior restraint.[118] Scalia criticized the new "intermediate-intermediate scrutiny" standard the majority set forth.[119] He argued that the criteria for injunctive relief had not been met in *Madsen* and was not demonstrated by the factual findings on record.[120]

Three years after the *Madsen* decision, the Supreme Court faced another injunction concerning restrictions on sidewalk counselors outside abortion clinics.[121] The protestors in *Schenck v. Pro-Choice Network*[122] harassed[123] both doctors and patients at abortion clinics.[124] In an effort to prevent further violence, a district court issued a temporary restraining order establishing a fifteen-foot buffer zone that allowed only two sidewalk counselors inside.[125] A few months later, however, the clinics and doctors charged that the abortion protestors were in breach of the

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ordinance which made it illegal "for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield").

116. *Id.* at 803 (Scalia, J., concurring in part, dissenting in part).

117. *Id.* at 793-94 (Scalia, J., concurring in part, dissenting in part).

118. *Id.* at 795-97 (Scalia, J., concurring in part, dissenting in part).

119. *Id.* at 794-95 (Scalia, J., concurring in part, dissenting in part).

120. *Id.* at 795-97 (Scalia, J., concurring in part, dissenting in part). Justice Scalia thought that the significant government interest, possible imminent violation of statutory or common law, and danger of recurrent violation satisfied the criteria for injunctive relief. *Id.* at 804 (Scalia, J., concurring in part, dissenting in part).

121. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 361 (1997).

122. 519 U.S. 357 (1997).

123. *See id.* at 362-63. For instance, the protestors frequently used their bodies to create large-scale blockades that prevented cars from entering the clinic parking lot. *Id.* Also, sidewalk counselors yelled at women entering the clinics, attempted to hand out literature, and discourage them from having an abortion. *Id.* If the women ignored them, the counselors yelled and sometimes physically harassed them. *Id.*

124. *Id.* Among the plaintiffs in this case were three physicians and four medical clinics that performed abortions and provided abortion-related services. *Id.* The defendants were several abortion protestors and organizations opposed to abortion. *Id.* at 362. In 1990, the plaintiffs filed suit alleging that the defendants had violated New York Civil Rights Law 40-c and New York Executive Law 296, tortiously interfered with plaintiff's business, trespassed, intentionally inflicted emotional harm on plaintiffs, and falsely imprisoned plaintiffs. *Id.* at 362; *see also* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1422 (W.D.N.Y. 1992).

125. *Schenck*, 519 U.S. at 362, 364.

temporary restraining order.[126] A preliminary injunction was then issued which prohibited protestors from demonstrating within fifteen feet of persons and vehicles entering or leaving the abortion clinics (floating bubble zones).[127] The Court also issued a "cease and desist" order that abortion protestors move fifteen feet away from anyone who indicated a desire not to talk to them, and a prohibition on demonstrations within fifteen feet of clinic entrances and driveways (fixed bubble or buffer zones).[128]

Chief Justice Rehnquist, again speaking for the Court, applied the *Madsen* test for injunctions.[129] The Court struck down the floating fifteen foot bubble zone because it prevented normal conversations or handbilling in a moving zone, burdened more speech than necessary to serve the governmental interests, and created an ambiguous burden for the protestors.[130] The Court, however, ruled that the state's interest in public safety and order, free flow of traffic, and protecting individuals seeking to exercise their rights, justified the fifteen-foot fixed buffer zone protecting entrances and driveways.[131] The majority emphasized the "extraordinary" record of violent and illegal conduct when the protestors came within fifteen feet of the entrances.[132] This prior restraint was necessary because harassment of the police prevented their prompt response.[133] The Court also used this justification to support the "cease and desist" order.[134]

Although the governmental interest in public safety is a valid interest, the plaintiffs in *Schenck* did not plead a claim for threat to public safety.[135] The Court reasoned, however, that "the fact that 'threat to public safety' is not listed anywhere in respondents' complaint as a claim does not preclude a court from relying on the significant governmental interest in public safety in assessing petitioners' First Amendment

126. *Id.* at 365.

127. *Id.* at 366-67.

128. *Id.* (discussing the details of the order).

129. *Id.* at 371-85 (noting the similarities to *Madsen*).

130. *Id.* at 370-80 (stating the reasons for invalidating the floating bubble zone). Justice Breyer would have affirmed the floating bubble zone because he read it as not floating beyond the clinic entrance area. *Id.* at 395-401 (Breyer, J., concurring in part, dissenting in part).

131. *Id.* at 376.

132. *See id* at 381-83. The protestors argued that the fixed buffer zone was overbroad because unchallenged parts of the injunction prevented trespass and blocked entrances. *Id.*

133. *Id.* at 381-82.

134. *Id.* at 383-85.

135. *Id.* at 376.

argument."[136] Therefore, the Court concluded that public safety may be at stake "because of the dangerous situation created by the interaction between cars and protestors and because of the fights that threatened to develop."[137]

Justice Scalia, joined by Justices Kennedy and Thomas, agreed that the floating bubble zone was unconstitutional, but disagreed with the Court's decision to uphold the fixed buffer zone and "cease and desist" orders.[138] Justice Scalia stated that the majority's rationale underlying the injunction was *not* that women have a right of access to clinics.[139] Instead, charged Scalia, the majority erroneously based its ruling on a "right to be let alone" and a right to be free from exposure to unwanted speech.[140] Justice Scalia reiterated that the majority previously held that "there is no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics."[141] Therefore, the dissenters argued that the majority erred in allowing the "right to be left alone" to trump the First Amendment guarantee of free speech.[142]

Justice Scalia also criticized the majority for striking only the most egregious restraints, yet tolerating the less egregious violations of the First Amendment.[143] Scalia disapproved of the Court's decision to uphold the "cease and desist" provision on the basis that this provision constituted "an effort to bend over backwards to 'accommodate' defendants' speech rights."[144] The degree to which courts "bend over backwards" does not nullify their duty to protect the First Amendment.[145]

Finally, Justice Scalia criticized the majority's creation of a claimed governmental interest to justify the injunction.[146] Although the district court specifically found that the protest activities of the defendants were "usually peaceful in nature,"[147] the Court repeatedly stated that the

136. *Id.*

137. *Id.*

138. *Id.* at 385-95 (Scalia, J., concurring in part, dissenting in part).

139. *Id.* at 386 (Scalia, J., concurring in part, dissenting in part).

140. *Id.* at 386-88 (Scalia, J., concurring in part, dissenting in part).

141. *Id.* at 386 (Scalia, J., concurring in part, dissenting in part).

142. *Id.* at 387 (Scalia, J., concurring in part, dissenting in part); *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776-820 (1994) (outlining the opinions of Justices Souter, Stevens, and Scalia).

143. *Schenck*, 519 U.S. at 390 (Scalia, J., concurring in part, dissenting in part).

144. *Id.* (Scalia, J., concurring in part, dissenting in part) (citation omitted).

145. *Id.* (Scalia, J., concurring in part, dissenting in part).

146. *Id.* at 392-93.

147. Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1423 (W.D.N.Y. 1992).

defendant's activities threatened public safety.[148] The Court created the governmental interest in public safety to uphold portions of the injunction.[149] Justice Scalia contended that protecting public safety is within the scope of the executive branch, and the judiciary should not act independently to protect perceived public interest when public safety is not the substance of the petitioners' complaint.[150] Therefore, the Court's holding was an improper expansion of judicial power.[151]

II. *HILL V. COLORADO*: LEGITIMIZATION OF STATUTORY RESTRICTIONS ON ABORTION PROTESTORS' FIRST AMENDMENT RIGHTS

Soon after it decided *Schenck*, the Court considered a challenge to a Colorado statute making it unlawful for any person to "knowingly approach" within eight feet of another person, without that person's consent, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person within regulated areas.[152] Shortly after the passage of the statute, petitioners, a group of sidewalk counselors,[153] brought their lawsuit in the District Court for Jefferson County, Colorado.[154] The petitioners alleged that their sidewalk counseling activities typically included being within eight feet of other persons and that their fear of prosecution under the new statute chilled their exercise of fundamental constitutional rights.[155] Claiming that the statute was facially invalid, petitioners sought to enjoin its enforcement.[156]

The district judge granted the respondents' motion for summary

148. *See, e.g.*, *Schenck*, 519 U.S. at 376.

149. *Id.* at 375. *See generally* Amber M. Pang, Comment, *Speech, Conduct, and Regulation of Abortion Protest by Court Injunction: From* Madsen v. Women's Health Center *to* Schenck v. Pro-Choice Network, 34 GONZ. L. REV. 201, 220-21 (1999).

150. *Schenck*, 519 U.S. at 392-93 (Scalia, J., concurring in part, dissenting in part).

151. *Id.* at 392 (Scalia, J., concurring in part, dissenting in part) (declaring the majority's holding as "a wonderful expansion of judicial power").

152. COLO. REV. STAT. § 18-9-122(3) (1999).

153. In their complaint and affidavits, petitioners describe themselves as "sidewalk counsel[ors]" who urge abortion-bound women to consider alternatives to abortion as the women enter the clinic. Hill v. Colorado, 530 U.S. 703, 708 (2000).

154. *Id.*

155. *Id.* at 708-09. "It is apparent from the testimony of both supporters and opponents of the statute that demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational." *Id.* at 709. However, the Court noted that "[t]here was no evidence . . . that the 'sidewalk counseling' conducted by petitioners in this case was ever abusive or confrontational." *Id.* at 710.

156. *Id.* at 708.

judgment and dismissed the complaint.[157] The Colorado Court of Appeals agreed with the district judge and affirmed the grant of summary judgment.[158] The Supreme Court of Colorado denied review, and petitioners sought a writ of certiorari from the Supreme Court.[159] While the *Hill* petition was pending, the Supreme Court decided *Schenck v. Pro-Choice Network*.[160] Since the Court held in *Schenck* that an injunctive provision creating a speech-free "floating buffer zone" was unconstitutional,[161] the Court vacated the judgment of the Colorado Court of Appeals and remanded the case to that court for further consideration in light of *Schenck*.[162] On remand the Court of Appeals again upheld the statute,[163] noting that in *Schenck* the Supreme Court "expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protestors."[164] The Colorado Supreme Court granted certiorari and affirmed the judgment of the Court of Appeals.[165] In 1999, the Supreme Court granted certiorari.[166]

In a six-three decision delivered by Justice Stevens, the Court affirmed the Colorado Supreme Court's holding that the statute was consistent with the First Amendment.[167] The Court found that the statute was content-neutral and a valid time, place, or manner restriction on speech.[168] Moreover, Justice Stevens argued that the common-law "right to be let alone" is more accurately characterized as an "interest" that

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157. *Id.* at 710. The district judge found that the text of the statute was not viewpoint based and that the legislative history demonstrated that "the State had not favored one viewpoint over another." *Id.* at 711. He concluded that the statute was narrowly tailored and was not overbroad. *Id.* Finally, he concluded that the statute was not vague and that the prior restraint doctrine was inapplicable. *Id.*

158. *Id.*

159. *Id.* at 712.

160. 519 U.S. 357 (1997); *see also supra* notes 118-47 and accompanying text.

161. *Schenck*, 519 U.S. at 370-80; *see also supra* notes 118-47 and accompanying text.

162. Hill v. Colorado, 519 U.S. 1145 (1997).

163. *See* Hill v. City of Lakewood, 949 P.2d 107, 109 (Colo. Ct. App. 1997), *aff'd*, 973 P.2d 1246 (Colo. 1999), *aff'd* 530 U.S. 703 (2000).

164. *Hill*, 530 U.S. at 712. The Court of Appeals found that even though a fifteen-foot floating buffer zone might preclude protestors from expressing their views from a normal conversational distance, a lesser distance of eight feet was sufficient to protect such speech. *Hill*, 949 P.2d at 110.

165. *Hill*, 530 U.S. at 712.

166. *Hill*, 527 U.S. 1068 (1999), *aff'd*, 530 U.S. 703 (2000).

167. *Hill*, 530 U.S. at 705, 714-15.

168. *Id.* at 719-25.

states can protect in certain situations.[169]

After finding content-neutrality, the Court applied the *Ward* test and held that the statute was narrowly tailored to serve the State's significant governmental interest.[170] In this case, the Court found that the government's interest outweighed the petitioners' rights to free speech.[171] Furthermore, the Court held that the statute was neither unconstitutionally vague, overbroad, nor a prior restraint on speech.[172]

In his dissent, Justice Scalia, joined by Justice Thomas, argued that the Court's decision was another example of how jurisprudence tends to change when a case involves abortion.[173] Justice Scalia described the statute as an invalid content-based regulation that violated the First Amendment.[174] Furthermore, Scalia argued that even if the statute was content-neutral, it should have been struck down because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests."[175]

A. The Majority Opinion: Finding Statutory Floating Buffer Zones Constitutional

In affirming the Colorado Supreme Court's decision, the Court for the first time held that statutorily-imposed buffer zones around health care facilities do not violate the principles of the First Amendment.[176]

1. Finding the Statute is Content Neutral

The *Hill* Court defined the neutrality of the statute by determining "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[177] Justice Stevens, speaking for the majority, found that the statute was not content based because (1) it is a regulation of where speech may occur, not a regulation of speech itself; (2) the legislative history and state supreme court's holding show

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169. *Id.* at 716-17. Justice Stevens discussed Justice Brandeis' view that the "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)).

170. *Hill*, 530 U.S. at 725-26.

171. *Id.* at 718; *see also infra* notes 184-88 and accompanying text.

172. *Id.* at 730-35; *see also infra* notes 197-208.

173. *Id.* at 742 (Scalia, J., dissenting).

174. *Id.* at 740-49 (Scalia, J., dissenting).

175. *Id.* at 749 (Scalia, J., dissenting) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

176. *Id.* at 714-15. The buffer zones upheld in *Schenck* and *Madsen* were imposed by injunctions, not statewide statutes. *See supra* notes 118-47 and accompanying text.

177. *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791).

that the restrictions apply equally to all demonstrators, regardless of viewpoint; and (3) the state's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.[178] The Court rejected the petitioners' argument that the statute unconstitutionally requires examination of the content of the speakers' comments.[179] Justice Stevens stated that it is proper for the Court to examine a statement's content in order to determine whether a rule of law applies to a particular course of conduct.[180] He then distinguished the Colorado statute from the statute in *Carey*[181] and concluded that Colorado imposed a "minor place restriction on an extremely broad category of communications with unwilling listeners."[182] The Court concluded that these restrictions are content-neutral because they apply to all protest and counseling and to all demonstrators - whether or not they oppose or support abortion.[183]

2. The Statute is a Valid Time, Place, or Manner Regulation Under Ward

Once the Court established that the statute was content-neutral, it looked to see whether the regulation was "narrowly tailored" to serve the state's significant governmental interests.[184] The governmental interest that the Court recognized was the privacy interest in avoiding unwanted communications.[185] Specifically, Justice Stevens found that the common-law "right to be let alone" is more accurately characterized as

178. *Id.* at 719-20 (discussing the content neutrality of the statute).

179. *Id.* at 720-24. The petitioners argued that insofar as the statute applies to persons who "knowingly approach" another within eight feet to engage in "oral protest, education, or counseling" it is unconstitutionally content based under *Carey v. Brown*. *Id.* at 720.

In *Carey*, the Court examined a prohibition of peaceful picketing that contained an exemption for picketing of a place of employment involved in a labor dispute. Carey v. Brown, 447 U.S. 455, 462-63 (1980). The Court concluded that the statute violated the Constitution because it accorded preferential treatment to expression concerning one particular subject matter while prohibiting discussion of all other issues. *Id.*

180. *Hill*, 530 U.S. at 721. In a footnote, Justice Stevens discussed a case where, "after examining a federal statute that was 'interpreted' . . . as 'prohibit[ing] picketing and leafleting, but not other expressive conduct' within the Supreme Court building and grounds," the Court concluded that the prohibition was facially content neutral. *Id.* at 722 n. 30 (discussing United States v. Grace, 461 U.S. 171 (1983)).

181. Justice Stevens noted that the Colorado statute applies equally to "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." *Hill*, 530 U.S. at 723.

182. *Id.*

183. *See id.* at 725.

184. *Id.* at 725-26.

185. *Id.*

an "interest" that states can protect in certain situations.[186] Justice Stevens noted that *Ward* did not require the least restrictive or least intrusive means of serving the goal.[187] He found the statute narrowly tailored to advance governmental interests for several reasons.[188]

The three types of speech affected by the statute - display of signs, leafleting, and oral speech - were not unconstitutionally infringed upon.[189] Concerning the signs, the Court rationalized that the eight-foot buffer zone should not have an adverse impact on the readers' ability to read what the demonstrators hold up.[190] Also, although the distance can make it more difficult for a speaker to be heard, the statute places no limitation on the number of speakers or the noise level, including the use of amplification equipment.[191] Justice Stevens suggested that this is the State's effort to compromise, since *Madsen* upheld these types of noise restrictions.[192] Justice Stevens also emphasized that Colorado's floating buffer zone is less invidious than the zone in *Schenck* because the eight-foot zone allows the speaker to communicate at a normal conversational distance.[193]

The majority recognized that the burden on leafleting was more serious than the burdens on oral speech and sign posting since an eight-foot buffer could prevent a leafletter from delivering handbills to some unwilling recipients.[194] However, the Court found the regulation was similar to a regulation it upheld in *Heffron v. International Society For Krishna Consciousness, Inc.*[195] and was therefore constitutional.[196] In *Heffron*, the Court emphasized that the First Amendment protects the

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186. *Id.* Justice Stevens relied on Justice Brandeis' words in asserting this state interest. Justice Brandeis stated that the "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

187. In *Ward*, the Court stated that "content-neutral interests . . . need not be the least restrictive or least intrusive means of doing so." Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

188. *Hill*, 530 U.S. at 724-32.

189. *Id.* at 726-32.

190. *Id.* at 726. Justice Stevens suggested that "the separation might actually aid the pedestrians' ability to see the signs by preventing others from surrounding them and impeding their view." *Id.*

191. *Id.*

192. *Id.*; *see also* Madsen v. Women's Health Ctr, Inc., 512 U.S. 753, 772-73 (1994).

193. *See Hill*, 530 U.S. at 726-27.

194. *Id.* at 727.

195. 452 U.S. 640 (1981). The Court upheld a state fair regulation that required a religious organization to distribute literature and conduct activity only at booths. *Id.* at 654-55.

196. *Hill*, 530 U.S. at 727.

right of every citizen to have the opportunity to gain the attention of willing listeners.[197] Therefore, since the statute only applies to unwilling listeners, the Court found that it adequately protected the rights of the leafletters.[198]

In addition, the Court justified the burden on all three types of communication because the eight-foot buffer zone does not affect demonstrators remaining in place without approaching another person.[199]

3. The Statue is Not Unconstitutionally Vague or Overbroad

The Supreme Court also rejected the petitioners' argument that section 18-9-122(3) is overbroad.[200] The Court reasoned that "[t]he fact that the coverage of a statute is broader than the specific concern . . . is of no constitutional significance."[201] The Court found that it was of no significance because the Colorado Legislature made a general policy choice to scrutinize the statute under the *Ward* standard, rather than a stricter standard.[202] The Court argued that the comprehensive nature of the statute was a virtue because it evidenced the neutrality of the governmental motive.[203]

The Court also ruled that the petitioners' argument that the statute was overbroad because it bans all protected expression resulted from a misreading of the statute and an incorrect understanding of the overbreadth doctrine.[204] Citing *Broadrick v. Oklahoma*,[205] Justice Stevens explained that the petitioners did not persuade the Court that the impact of the statute on the conduct of other speakers will differ from its impact

197. *Heffron*, 452 U.S. at 655 (noting that people may "reach the minds of willing listeners and to do so there must be opportunity to win their attention" (citing Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

198. *Hill*, 530 U.S. at 727.

199. *See id.*

200. *Id.* at 730. The petitioners argued that the statute was too broad because it protected too many people in too many places, rather than just patients at facilities where confrontational speech had occurred. *Id.* Also, it burdened all speakers, not just those who have a history of bad conduct. *Id.*

201. *Id.* at 730-31.

202. *Id.* at 731; *see also* Madsen v. Women's Health Ctr, Inc., 512 U.S. 753, 764 (1994).

203. *Hill*, 530 U.S. at 731.

204. *Id.*

205. 413 U.S. 601 (1973). The overbreadth doctrine enables litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612. Moreover, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

on their sidewalk counseling.[206] Therefore, since the conduct of other protestors and counselors at all health care facilities are encompassed within the statute's legitimate sweep, the statute is not overly broad.[207]

Justice Stevens also stated that section 18-9-122(3) of the Colorado statute was not unconstitutionally vague.[208] First, the Court concluded that the scienter requirement of the statute prevented the statute from being too vague.[209] Specifically, the Court asserted that people would understand what "knowingly" approaching for the purpose of engaging in oral protest, education, or counseling entails.[210] The Court thus concluded that "it is clear what the ordinance as a whole prohibits."[211]

4. Section 18-9-122(3) Does Not Impose a Prior Restraint on Speech

The Court found that the restrictions imposed by the Colorado statute raise an even lesser prior restraint concern than those in *Schenck* and *Madsen*.[212] The Court held that the statute does not provide for a "heckler's veto" but instead allows all speakers to engage in expressive activity communicating all viewpoints subject only to the narrow place requirement found within the "approach" restriction.[213] Furthermore, the Court stated that prior restraint concerns relate to restrictions imposed by official censorship, but the Colorado statute only applies if the pedestrian does not consent to the approach.[214]

B. Scalia's Dissent: Discounting the Court's Reasoning

Justice Scalia's dissent charged the majority with setting aside whatever doctrines of constitutional law that stand in the way of women obtaining abortions.[215] He conceded that this decision was no surprise since the Court has characteristically deprived abortion opponents the

206. *Hill*, 530 U.S. at 732.

207. *Id.*

208. *Id.* at 732-33. Stevens explained that there are two ways a regulation can be impermissibly vague: "(1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;" and "(2) it authorizes or encourages arbitrary and discriminatory enforcement." *Id.*; *see also* Chicago v. Morales, 527 U.S. 41, 56-57 (1999).

209. *Hill*, 530 U.S. at 732.

210. *Id.*

211. *Id.* at 733 (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

212. *See supra* notes 130-32 and accompanying text. In *Schenck* and *Madsen*, particular speakers were at times completely banned within certain zones.

213. *Hill*, 530 U.S. at 734.

214. *Id.*

215. *Id.* at 741 (Scalia, J., dissenting).

ability to persuade women contemplating abortion that such activity is wrong.[216]

1. The Statute is Undeniably Content Based

Justice Scalia argued that the statute is content-based since a speaker who approaches another for the purpose of communicating any message except one of protest, education, or counseling, may do so without violating the statute.[217] Therefore, whether or not a speaker violates the law depends entirely on what he or she intends to say to the other person.[218] The *content* of the speech is determinative. Justice Scalia questioned the majority's reasoning that "oral protest, education, or counseling" are likely to present the problem of "harassment, . . . nuisance, . . . persistent importuning, . . . following, . . . dogging, and . . . implied threat of physical touching."[219] Scalia conceded that oral protest may run these risks; however, he found it unlikely that education and counseling would produce such conduct.[220]

Scalia then asserted that the words of the statute - "oral protest," "education," and "counseling" - are used to give the *impression* of content neutrality.[221] In reality, however, these words are used to hide the true purpose of the statute, which is to prevent protestors from dissuading women from abortion.[222] Justice Scalia charged that the true purpose of the Colorado Legislature was evidenced in the wording of the statute itself: the "right to protest or counsel *against* certain medical procedures" around health care facilities.[223] Scalia explains that one type of speech was the target of the legislation.[224]

Justice Scalia then discussed the Court's willingness to examine the content of a communication to determine whether it "constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods."[225] Speech of certain content may be constitutionally banned; however, the Court has

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216. *Id.* at 741-42 (Scalia, J., dissenting).

217. *Id.* at 742 (Scalia, J., dissenting).

218. *Id.* (Scalia, J., dissenting).

219. *Id.* at 743 n.1 (Scalia, J., dissenting).

220. *Id.* (Scalia, J., dissenting). Justice Scalia said that "Socrates *was* something of a *noodge*, but even he did not go *that* far." *Id.*

221. *Id.* (Scalia, J., dissenting).

222. *Id.* (Scalia, J., dissenting).

223. *Id.* at 744 (Scalia, J., dissenting) (noting the language of COL. REV. STAT. § 18-9-122(1) (1999)).

224. *Id.* (Scalia, J., dissenting).

225. *Id.* at 746 (Scalia, J., dissenting).

never taken the step of relegating "protest, education, and counseling" to the category of constitutionally proscribed speech.[226] Justice Scalia concluded that the statute was a content-based restriction upon speech in a public forum; therefore it must pass strict scrutiny and be narrowly tailored to serve a compelling state interest.[227]

2. Even if Content-Neutral, the Statute Does Not Pass the Time, Place, or Manner Test

Justice Scalia criticized the majority for its confusion as to what was truly Colorado's asserted interest in passing the legislation.[228] Colorado identified in the text of the statute the interest it sought to advance: to ensure that citizens may "obtain medical counseling and treatment in an unobstructed manner" by "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility."[229] The Court, on the other hand, concluded that the restriction is narrowly tailored to serve "the State's interest in protecting its citizens' rights to be let alone from unwanted speech."[230]

Justice Scalia noted that not only was the Court's asserted interest completely different from the State's declared interest, but the state explicitly *disclaimed* the interest to be let alone as a "straw interest."[231] Therefore, the Court justified a statute by relying on a governmental interest that was "not only unasserted by the State," but was positively rejected.[232]

Scalia then discredited the governmental interest that the Court invented.[233] He observed that the "right to be let alone" that Justice Brandeis enunciated in *Olmstead* was a right to be let alone *by the*

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226. *Id.* (Scalia, J., dissenting).

227. *See id.* at 748. Justice Scalia then analyzed the statute under the strict scrutiny standard and found that the government interest (protecting people from unwilling communications) is not a compelling governmental interest. *Id.* at 748-49. Also, forbidding peaceful, non-threatening, but uninvited speech from a distance closer than eight feet is not narrowly tailored. *Id.* at 749. Scalia stated that if the statute were narrowly tailored the "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Id.*

228. *Id.* at 749-50 (Scalia, J., dissenting).

229. COLO. REV. STAT. § 18-9-122(1) (1999); *see also Hill*, 530 U.S. at 749-50 (Scalia, J., dissenting) (noting that the respondents briefs reiterated the asserted state interest).

230. *See* 530 U.S. at 750 (Scalia, J., dissenting) (emphasis omitted); *see also supra* notes 185-86 and accompanying text.

231. *Id.* (Scalia, J., dissenting) (discussing Brief for Respondents 15 at 25 n.19).

232. *Id.* (Scalia, J., dissenting).

233. *Id.* at 751 (Scalia, J., dissenting).

government;[234] and not an "interest to be free from hearing unwanted opinions of one's fellow citizens."[235] Furthermore, Scalia noted that as recently as the *Schenck* opinion, the Court indicated that in public debate "citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[236] Therefore, according to precedent, only when speech intrudes into the privacy of the home can such offensive messages be restricted.[237] Consequently, Justice Scalia concluded that by upholding the statute, the Court essentially raised the protection given to an abortion clinic to that given a home.[238]

3. The Ward Test Applied to Colorado's True Interest

Scalia then scrutinized[239] the statute under the true state interest asserted in Colorado's brief: unhindered access to healthcare facilities.[240] He argued this interest does not justify the substantial burdens that the statute imposes on the right to speak and pass handbills.[241] The law effectively dissolves the type of personal counseling that some protestors engage in outside clinics.[242] Also, by forbidding leafletters from

234. *Id.* at 751 (Scalia, J., dissenting); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

235. *Hill*, 530 U.S. at 751 (Scalia, J., dissenting).

236. Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997).

237. *See supra* notes 45-53 (discussing the captive audience doctrine).

238. *Hill*, 530 U.S. at 752-53 (Scalia, J., dissenting).

239. Scalia focused on the narrow tailoring requirement. *Id.* at 754-55. He argued that the majority's decision effectively created a new definition of "narrowly tailored." *Id.* at 755-56. Scalia asserted that the Court's new test suggests that the availability of alternative means of communication allows more types of communication, by more individuals, to be proscribed. *Id.* at 756. This relaxed standard does not fit within the "narrowly tailored" framework. *Id.*

240. *Id.* at 754 (Scalia, J., dissenting).

241. *Id.* at 757-58 (Scalia, J., dissenting) (discussing the burdens that the statute imposes on protestors ability to speak and pass handbills).

242. *Id.* at 757 (Scalia, J., dissenting). In an outdoor environment the type of sensitive counseling and educating that is likely to take place outside of a clinic cannot be done by yelling to someone from an eight foot distance. *Id.* Scalia observed that:

> The availability of a powerful amplification system will be of little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?" The Court would have us believe that this can be done effectively – yea, perhaps even *more*

approaching women within eight feet, the Court completely renders the practice of handbilling ineffective.[243]

The broad prophylactic restrictions imposed by the Colorado statute, argued Scalia, are not sufficiently connected to the evil the regulation sought to eliminate.[244] Scalia compared the Colorado statute to the regulation the Court struck down in *United States v. Grace*.[245] In *Grace*, the valid interest in security could not justify a broad ban on certain expressive activity on the sidewalks surrounding the Supreme Court.[246] Scalia argued that the Colorado statute is similar to the ban in *Grace* because it lacks precision and a sufficient nexus.[247]

Under First Amendment doctrine, the proper inquiry is whether the regulation in question burdens more speech than necessary to achieve the *particular interest* the government has identified.[248] Scalia contended that in this case, the statute lacked the requisite precision and the Court should have invalidated it as a result.[249]

The *Schenck* and *Madsen* decisions offer no support for the majority's approval of the prophylactic measure taken by the Colorado Legislature.[250] In *Schenck*, the Court upheld the injunction because the defendants' past conduct demonstrated that they would, if permitted

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effectively – by shouting through a bullhorn at a distance of eight feet.

Id.

243. *Id.* at 757 (Scalia, J., dissenting). Handbilling is a "classic form[] of speech that lie[s] at the heart of the First Amendment." *Schenck v. Pro Choice Network*, 519 U.S. 357, 377 (1997). The practice of passing handbills requires the handbiller to walk a few steps toward individuals passing in the vicinity. *Hill*, 530 U.S. at 758. By extending his arm, the handbiller makes it as easy as possible for the passerby to accept the offering. *Id.* Since few pedestrians are likely to give their consent to a handbiller's approach, the practice has been constructively extinguished. *Id.*

244. *Hill*, 530 U.S. at 758-59 (Scalia, J., dissenting). Unlike other cases where the Court upheld content-neutral, time, place and manner restrictions on expression, the Colorado statute, argued Scalia, lacked a sufficient nexus between the regulated expression and the evil sought to be eliminated. *Id.* at 758. In *Ward*, the regulation of sound amplification was upheld because every occasion of amplified sound could disturb the areas surrounding the public forum. Ward v. Rock Against Racism, 491 U.S. 781, 795 (1998). Instead of banning all concerts, the regulation focused on the "source of the evils the city [sought] to eliminate . . . and eliminate[d] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id.* at 799 n.7.

245. 461 U.S. 171 (1983).

246. *Id.* at 181-82.

247. *Hill*, 530 U.S. at 759 (Scalia, J., dissenting).

248. *Id.* at 760 n.4 (Scalia, J., dissenting) (citing *Ward*, 491 U.S. at 799).

249. *Id.* at 759 (Scalia, J., dissenting).

250. *Id.* at 761-62 (Scalia, J., dissenting).

within the buffer zone, continue to impede the free flow of traffic.[251] Similarly, in *Madsen*, the Court concluded that "[a]bsent evidence that the protesters' speech is independently proscribable (i.e. 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm," restrictions on their speech cannot stand.[252] Scalia argued that the First Amendment was intended to protect people from prophylactic legislation such as the Colorado statute.[253]

Individuals whose objective it is to frighten women or doctors will not be deterred by the Colorado statute; they can still scream and use amplification systems from eight feet away.[254] In reality, the only people who will be deterred by the statute are those who would achieve their stated objectives by peaceful means.[255] In addition, Justice Scalia maintained that the Court's decision added the First Amendment doctrines of narrow tailoring and overbreadth to the list of fatalities caused by the Court's pro-abortion jurisprudence.[256] Justice Scalia was not surprised, however, because the Court characteristically goes out of its way to justify pro-abortion measures.[257]

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251. *Id.* at 761 (Scalia, J., dissenting); *see also* Schenck v. Pro-Choice Network, 519 U.S. 357, 382 (1997) (stating that the defendants would "continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars").

252. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994).

253. *Hill*, 530 U.S. 761-62 (Scalia, J., dissenting). Scalia quoted *NAACP v. Button*, which said that "[b]road prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

254. *Id.* at 763 (Scalia, J., dissenting).

255. *Id.* (Scalia, J., dissenting).

256. *Id.* at 762 (Scalia, J., dissenting).

257. *Id.* at 764 (Scalia, J., dissenting). Scalia compared the *Hill* decision with *Stenberg v. Carhart*, 530 U.S. 914 (2000), which the Court decided on the same day. Scalia noted that the Court used contradictory rationales in the two cases to achieve the same goal: unequivocal support of abortion. *Hill*, 530 U.S. at 764. Scalia noted:

> The present case disregards the State's own assertion of the purpose of its proabortion law, and posits instead a purpose that the Court believes will be more likely to render the law *constitutional*. *Stenberg* rejects the State's assertion of the very meaning of its antiabortion law, and declares instead a meaning that will render the law *un*constitutional. The present case *rejects* overbreadth challenges to a proabortion law that regulates speech, on grounds that have no support in our prior jurisprudence and that instead amount to a total repudiation of the doctrine of overbreadth. *Stenberg applies* overbreadth analysis to an antiabortion law that has nothing to do with speech, even though until eight years ago overbreadth was unquestionably the exclusive preserve of the First Amendment.

Id.; *see also Stenberg*, 530 U.S. at 954; Janklow v. Planned Parenthood, Sioux Falls

III. THE SUPREME COURT'S JUDICIAL MANEUVERS TO SILENCE THE ANTI-ABORTION MESSAGE

The majority's reasoning in *Hill* is flawed for many reasons and exemplifies the Court's willingness to silence moral debate when it concerns opposition to abortion.[258] The Court first erred in finding the statute content-neutral.[259] The words of the statute indicate that the restriction was aimed exclusively at those who protest against abortion.[260] Since its stated purpose is to restrict a certain type of speech, the statute is not content-neutral.[261] Abortion protestors' dissidence inspired the statute and it manifests the Colorado Legislature's desire to silence the protestors' message.[262] Had the statute concerned subject matter other than abortion, the Court might have followed its First Amendment jurisprudence and strictly scrutinized it as a content-based regulation.[263]

After erroneously finding the statute content-neutral, the Court invented a state interest in an attempt to satisfy the narrow tailoring requirement.[264] As Justice Scalia stated in his dissent, the interest created by the Court - the right "to be let alone"- was not only different from the interest that the statute set forth, it was also disclaimed by the State in its brief.[265] In addition, as recently as 1997, the Court refused to rely on any

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Clinic, 517 U.S. 1174, 1177-1181 (1996) (Scalia, J., dissenting on denial of certiorari); Ada v. Guam Soc. Of Obstetricians & Gynecologists, 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting of denial of certiorari).

258. *See supra* section II; *see generally* SMOLLA *supra* note 24, § 2.02 (discussing the importance of allowing the free flow of ideas); Ellis & Wu, *supra* note 11, at 583; Wardle, *supra* note 15, at 957-61; Youmans, *supra* note 11, at 632-33.

259. *See supra* notes 175-81 and accompanying text.

260. COLO REV. STAT. § 18-9-122(1) (2000) (stating that "the exercise of a person's right to protest or counsel *against* certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner) (emphasis added).

261. *See supra* notes 54-64 and accompanying text (discussing content neutrality).

262. The Colorado statute is similar to the statute strictly scrutinized in *R.A.V. v. St. Paul.* Although not as explicit as the statute in *R.A.V.*, the Colorado statute is clearly addressed to one disfavored topic. *See* COLO. REV. STAT. § 18-9-122(1) (2000) (noting that the restriction applies to the "right to protest or counsel *against* certain medical procedures") (emphasis added).

263. Outside of the abortion context, the Supreme Court has been quick to recognize regulations that are content-based. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 395-96 (1992) (striking down a St. Paul Bias-Motivated Crime Ordinance); Police Dep't v. Mosley, 408 U.S. 92, 94 n.2 (1972) (invalidating a Chicago disorderly conduct ordinance that barred picketing within one hundred and fifty feet of a school while the school was in session, but exempted "peaceful picketing of any school involved in a labor dispute").

264. Hill v. Colorado, 530 U.S. 703, 715-17 (2000).

265. *Id.* at 750 (Scalia, J., dissenting). Scalia asserted that Colorado was correct in refusing to recognize the right "to be let alone" as a legitimate interest because the

supposed "right of the people approaching and entering the [abortion] facilities to be left alone."[266] The Court's exaltation of this interest is unsupported and has been explicitly declared invalid.[267]

Furthermore, permitting states to proscribe "education" and "counseling" creates a slippery and terrifying slope.[268] Banning such speech is invidious to the very principles behind the First Amendment.[269] The vague and overbroad language of the statute is problematic when one considers the ramifications of banning peaceful conduct such as education and counseling.[270] The majority tried to cure this problem by suggesting that the scienter requirement[271] "makes it clear what the ordinance as a whole prohibits."[272] Without explicitly saying so, the majority conceded that the sole target of the statute is the speech of abortion protestors.[273] As such, the statute is blatantly viewpoint-based and should have been invalidated without further review.[274] Instead of

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Supreme Court had previously refused to recognize it. *Id.*

266. Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997). The Court doubted that the right to be let alone "accurately reflects our First Amendment jurisprudence." *Id.*

The Court derived the "right to be let alone" from Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928). However, the right that Justice Brandies identified was a right "conferred, as against the government," not a generalized right to be free from hearing opinions of one's fellow citizens. *Id.*

267. *See supra* note 266.

268. Section 18-9-122 punishes those who approach for the purpose of "education" or "counseling." COLO. REV. STAT. § 18-9-122(3) (2000).

269. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I; *see also* Of Freedom of Speech, *supra* note 32, at 16 (stating that "[f]reedom of Speech, therefore, being of such infinite Importance to the Preservation of Liberty, everyone who loves Liberty ought to encourage Freedom of Speech . . .").

270. *See generally* Wardle, *supra* note 15, 915-39 (discussing the hurdles aboltionists had to overcome and analogizing their plight to that of modern day abortion protestors).

The petitioners also contended that the word "approaching" was unconstitutionally vague. *Hill*, 530 U.S. at 732. Specifically, the petitioners questioned whether certain physical movements such as an outstretched arm constitutes "approaching." *Id.*

271. Section 18-9-122(3) applies to a person who "knowingly" approaches another within eight feet, without that person's consent, for the purpose of engaging in oral protest, education, or counseling. COLO. REV. STAT. § 18-9-122(3)

272. *Hill*, 530 U.S. at 732-33 (internal quotations omitted). Justice Stevens further contended that "[t]he likelihood that anyone would not understand any of those common words seems quite remote." *Id.* at 732.

273. *Id.* at 743 n.1 (Scalia, J., dissenting) (stating that "'education' and 'counseling' are code words for efforts to dissuade women from abortion - in which event the statute would not be viewpoint neutral, which the Court concedes makes it invalid").

274. *Id.* (Scalia, J., dissenting). The *Madsen* Court stated that "[t]he vice of content-based legislation -- what renders it *deserving* of the high standard of strict scrutiny -- is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use

formally acknowledging the invidious content-based nature of the statute, the majority avoided the issue by suggesting that it is unlikely that "anyone would not understand any of those common words."[275]

The majority also distorted the captive audience doctrine.[276] The Court's willingness to distort the doctrine in the abortion context is clear when one compares the Court's analysis of the Colorado statute to other regulations examined in the past.[277] In *Frisby*, the Court upheld a content-neutral ordinance prohibiting picketing outside of a home because it was narrowly tailored and justified by the government's interest in protecting residential privacy.[278] The linchpin of the Court's decision was that the ordinance protected intrusion into the home.[279] Outside the sanctuary of the home, however, people may be subjected to objectionable speech.[280] This was shown in *Grace*, where the Court declined to uphold a ban on certain expressive activity outside of the Supreme Court.[281] Although the Court refused to uphold speech

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for those purposes." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 794 (1994).

Scalia refuted the majority's contention that the Colorado statute poses no threat to First Amendment freedoms because it applied to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries by comparing it to Anatole France's reflection that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ." *Hill*, 530 U.S. at 744 (Scalia, J., dissenting) (quoting J. BARTLETT, FAMILIAR QUOTATIONS 550 (16th ed. 1992)). Scalia contended that "[t]his Colorado law is no more targeted at used car salesmen, animal rights activists, fund raisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich." *Id.*

275. *Id.* at 732.

276. *See supra* § IIA (discussing the majority's reasoning).

277. *See, e.g.* Frisby v. Schultz, 487 U.S. 474, 477 (1988) (examining an ordinance that made it "unlawful for any person to engage in picketing before or about [a] residence"); United States v. Grace, 461 U.S. 171, 172-73 (1983) (looking at a statute that prohibited displays in front of the Supreme Court); Rowan v. United States Post Office Dep't, 397 U.S. 728, 729 (1970) (examining Title III of the Postal Revenue and Federal Salary Act of 1967).

278. *Frisby*, 487 U.S. at 484.

279. *Id.*

280. *Id.* "Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19 (2d ed. 1988).

281. *Grace*, 461 U.S. at 181. The provision at issue in *Grace* was part of a 1949 statutory scheme intended to protect the Supreme Court grounds. *Id.* at 173 n.1. The statute provided:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

Id.

restrictions outside of the Supreme Court, it infringed on the First Amendment rights of people outside of abortion clinics.[282] Therefore, by upholding the Colorado statute, the Court elevated abortion clinics to the status of the home.[283]

The *Hill* decision is a significant departure from *Madsen* and *Schenck* because it is the first time the Court has upheld a statute with a floating buffer zone outside of health care facilities.[284] States may now enact legislation such as the Colorado statute and bypass injunctions of the type examined in *Madsen* and *Schenck*.[285] With each decision concerning abortion protestors' First Amendment rights, the Court allows more and more governmental infringement.[286] As long as states draft their pro-abortion legislation in a manner explicitly revealing their invidious purposes, the Court will continue to uphold statutes that infringe on protestors' constitutional right to free speech.

IV. CONCLUSION

In the past ten years the Court has increasingly infringed on the rights of abortion protestors. The Court has continuously restricted more and more of the constitutionally protected rights of protestors. The *Hill* decision opened the door to state, and perhaps federal, legislation infringing on individuals' Constitutional rights. Unfortunately, the Court's judicial maneuvering ensures that only the message of abortion protestors will be silenced.

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282. *Compare id.* at 181, *with* Hill v. Colorado, 530 U.S. 703 (2000).

283. *Hill*, 530 U.S. at 759-60 (Scalia, J., dissenting) (noting that the Court does not suggest that a pedestrian is a "captive" of a speaker seeking to address him on the public sidewalks). *But see id.* at 718 (suggesting that "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure").

284. *See generally* Ellis & Wu, *supra* note 11; Youmans, *supra* note 11.

285. A statewide statute will enable courts to impose criminal sanctions immediately, thereby trumping the use of an injunction. *Hill*, 530 U.S. at 761-62 (Scalia, J., dissenting).

286. It is evident from the holdings in *Madsen*, *Schenck*, and *Hill* that the Court has increasingly infringed on the First Amendment freedoms of abortion protestors.